R.D. # 0004-04
Bergen County, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

BERGEN COUNTY COMMUNITY ACTION PROGRAM, INC.[1] **Employer**	
and	**CASE 22-RC-12440**
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 617, AFL-CIO, CLC[2] **Petitioner**	

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner seeks to represent a unit of approximately 13 employees consisting of cooks, kitchen specialists,[3] drivers and trainees employed in the Special Program of Instruction for Culinary Employment ("SPICE"), a division of the Employer's operation located at three facilities in Bergen County, New Jersey: two in Hackensack (Kansas Street and Second Street) and in Bergenfield. The Employer argues that the kitchen specialists are supervisors within the meaning of Section 2(11) of the Act and that the trainees are not employees under Section 2(3) of the Act.

For the reasons described below, I find that kitchen specialists are not supervisors within the meaning of the Act and that trainees are employees under the Act and I will order an election as set forth below in a unit which includes these classifications.

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

[3] The Employer used the terms kitchen specialist and kitchen supervisor interchangeably to described this classification. This decision will refer to the position as kitchen specialist.

Under Section 3(b) of the Act I have the authority to hear and decide this matter on behalf of the Board. Upon the entire record in this proceeding I find:[4]

1. A hearing was held before a hearing officer of the Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[5]

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[6]

3. The labor organization involved claims to represent certain employees of the Employer.[7]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. There is no history of collective bargaining for the employees involved in this proceeding and there is no contract bar or other bar that would preclude processing of the petition.

6. The following employees of Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

> **All cooks, kitchen specialists, drivers and trainees in the Special Program of Instruction for Culinary Employment ("SPICE") program employed by the Employer at its Bergen County, New Jersey facilities located in Hackensack, New Jersey and Bergenfield, New Jersey, but**

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[4] Briefs filed by the parties have been fully considered.

[5] The Employer raised an argument in its brief concerning the adequacy of the showing of interest submitted in support of the petition. The sufficiency of the Petitioner's showing of interest is an administrative matter not subject to litigation. *O.D. Jennings and Company*, 68 NLRB 516 (1946). The Employer in its brief also raised the contention that it was denied due process by not having sufficient time to prepare for the hearing and that one of its witnesses was unavailable at the time of the hearing. In this regard, the Employer's counsel stipulated that it received a copy of the petition in this matter filed on February 12, 2004, acknowledged receipt of the notice of hearing and appeared at the hearing and presented evidence. At the outset of the Hearing, counsel's request for a postponement was denied. The employer did not appeal this ruling. The Employer then chose to only proffer one witness at the hearing. When that witness completed his testimony, counsel for the Employer indicated that she had no further witnesses to present and did not renew its request for a continuance at that time to present further witnesses. In these circumstances, I find that the Employer has failed to demonstrate a denial of due process in this matter. *1 Skyline Builders, Inc.*, 340 NLRB No. 13 (2003).

[6] The Employer is a non-profit, New Jersey corporation engaged, *inter alia*, in anti-poverty programs and the provision of early childhood education services at various Head Start Facilities in Bergen County, New Jersey, including two facilities in Hackensack and one in Bergenfield, New Jersey. In the provision of these services, it teaches food service skills to indigent individuals. These three facilities are the only facilities involved herein.

[7] The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

excluding all office clerical employees, confidential employees, professional employees, managers, the Food Service Director, guards and supervisors as defined in the Act, and all other employees.

II. FACTS

A. Employer's Operations

The Employer is engaged in operating a federally designated anti-poverty agency in Bergen County, New Jersey which serves approximately 18,000 people a year. It employs approximately 220 individuals in various programs including SPICE, a culinary training program. SPICE provides participants with a 15-week course that includes adult basic education, employment readiness training, basic culinary skills and work experience, job placement and follow-up services. Participants in the program are known as "trainees." Trainees must be: (1) Bergen County residents; (2) at or below the poverty level; and (3) at least 18 years of age. There are three trainees currently enrolled in the program.

The SPICE program provides breakfast, lunch and snacks for pre-school aged children in various Bergen County locations for Head Start programs administered by Bergen County Community Action Program Inc. ("BCCAP") and occasionally caters events for various Bergen County agencies. The program has kitchen and food preparation areas at three different locations in Bergen County: two in Hackensack, New Jersey (Kansas Street and Second Street) and in Bergenfield, New Jersey.

The program employs a full time staff of approximately 13 employees that include cooks, kitchen specialists, drivers, trainees and a Director of Food Service.[8] All employees, including trainees, work a five day, 40-hour week, are paid an hourly rate around $8.00 an hour and are eligible for health insurance benefits. Taxes are withheld and reported for all employees, including the trainees. The record reveals that kitchen specialists and trainees work side by side with cooks and drivers and share the same primary duties, such as cooking, cleaning and serving food.

B. Kitchen Specialists

Kitchen specialists are responsible for the operation of the kitchen, preparing food, cleaning the kitchen and ordering food. There is no evidence in the record that kitchen specialists exercise any independent judgment in conducting any of those tasks. Like other employees, kitchen specialists use a sign in sheet to document their arrival and departure times. Kitchen specialists do not attend managerial meetings. The record reveals that kitchen specialists do not possess the authority to hire, fire or direct workers. Further there was no probative evidence presented at the hearing that kitchen specialists recommend the hiring, firing or transferring of workers. In this

[8] The parties stipulated that the Director of Food Service is a supervisor under Section 2(11) of the Act. He is, therefore, excluded from the unit found appropriate here.

connection, the record described the kitchen specialist's role as assisting the Food Service Director in "arriving at decisions related to hiring and firing." No documents, or specific examples of these actions were provided. As to the Employer's assertion that kitchen specialists interview potential employees, the record failed to detail the extent of this involvement in the hiring process, except that they advise the Food Service Director concerning the compatibility of the potential employee.

Additionally, the evidence adduced at the hearing revealed that kitchen specialists do not discipline employees. It is undisputed that kitchen specialists do not have the authority to authorize overtime or schedule time off.

Though the Employer asserts that kitchen specialists participate in annual evaluations of employees, the extent and the effectiveness of their participation in this process were not specified. In this regard, the record was devoid of evidence of specific recommendations made by kitchen specialists that affected evaluations, nor did the record have any detail regarding what role kitchen specialists have in the evaluation process.

C. Trainees

The record discloses that trainees work side by side with cooks, drivers and kitchen specialists. They perform the same work as the cooks and drivers and are paid an hourly wage similar to the other workers. Once the fifteen weeks of vocational training is complete, the program assists graduates in finding jobs. During this period of time, the trainees continue to work a five-day, forty-hour workweek in the program and receive pay and other fringe benefits. Employer witness Deputy Executive Director Dr. Allan DeGuilio testified that, after the vocational training period is over, "our intention is not to put a halt to the person's tenure with us but where possible, to retain the person so that they can maintain skills and they can maintain a relationship in the field and then ultimately find a job outside of the agency." There is no definite cut off date for trainees to leave the program. If a trainee is not successful in finding a job outside of the program, the trainee is retained by the Employer if a position exists. There is no evidence that trainees are involuntarily severed from the program.

III. ANALYSIS & CONCLUSION

A. KITCHEN SPECIALISTS

Section 2(11) of the Act defines a "supervisor" as: [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive, and only one need exist to confer supervisory status on an individual. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Ohio River Co.*, 303 NLRB 696, 713 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Groves Truck & Trailer*, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981).

Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc., et al*., 532 U.S. 706, 713 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. See *Kentucky River*, above*; Michigan Masonic Home*, 332 NLRB 1409 (2000). Lack of evidence is construed against the party asserting supervisory status. See *Michigan Masonic Home*, above. "Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, above at 490. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer has provided little direct evidence to establish that kitchen specialists are supervisors under the Act. In this regard, there was no evidence offered of the actual exercise of authority and independent judgment. The facts adduced at the hearing made clear that kitchen specialists could not hire, fire or direct employees. As to their participation in the evaluation and hiring processes, the record does not support the Employer's assertions that kitchen specialists exercise sufficient authority in these areas to warrant a conclusion that they are supervisors within the meaning of the Act. In this regard, there is no record evidence as to what roles they perform in the evaluation and hiring processes and whether their involvement is meaningful in establishing an exercise of independent judgment in these area. *Wal-Mart Stores, Inc.*, 335 NLRB 1310 (2001).

Absent detailed and specific evidence of independent judgment, mere inference or conclusionary statements, without supporting evidence, are insufficient to support supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears Roebuck & Co.*, above.

Based upon the above and the record as a whole, noting that the kitchen specialists share similar terms and conditions of employment as other unit employees and the absence of evidence that they have independent authority as defined in Section 2(11) of the Act, I find that they do not possess any indicia of supervisory

status that would warrant their exclusion from the unit. *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995).

B. TRAINEES

Section 2(3) of the Act broadly defines the term employee to include "any employee." *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91-92 (1995); *NYU*, 332 NLRB 1205 (2000). As a result, the Board has held that unless a category of workers is among the few groups specifically exempted from the Act's coverage, the group plainly comes within the statutory definition of "employee." Id., citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). The Board determines whether an individual is an employee in accordance with the common law master-servant test. *Town & Country*, above at 93-95; *NYU*, above at 1205. Under the common law master-servant test, an individual is an employee when services are performed for the master, under its control, for compensation. *Town & Country*, above at 90-91; *NYU*, above at 1205.

In *NYU*, the Board held that graduate students employed by the university as research assistants were Section 2(3) employees. Id. In reaching this determination, the Board first reviewed Section 2(3) and concluded that graduate students and research assistants were not expressly excluded from the Act. The Board then applied the master-servant doctrine and concluded that graduate students performed services for the university under its control, for compensation and, hence, were employees. Id.; see also *Boston Medical Center Corp.* 300 NLRB 152 (1999) (medical interns, residents and fellows were Section 2(3) employees, notwithstanding the fact that their employment was primarily educational).

I find that the Employer's trainees are employees as defined by Section 2(3) of the Act. Trainees do not fall within any categories of workers specifically exempted from the Act's coverage. Furthermore, trainees satisfy the master-servant doctrine, as they clearly perform services, under the Employer's control, for compensation. Trainees perform a service for the Employer by working in the kitchen side by side with cooks, kitchen specialists and drivers. Trainees, like other employees, are compensated for their services and paid an hourly wage, receive fringe benefits such as medical insurance and work a five-day, forty-hour work week. Though it is the intention of the program to place the trainees with other employers upon completion of their training, they remain in the employment of the Employer until that time. Therefore, it is the present duties and interests of the employees that are determinative of their unit placement, not whatever future assignments they may hope or expect to receive. *Heckett Engineering Co.*, 117 NLRB 1395 (1957). Further, trainees remain in the employment of the Employer for periods of indefinite duration and they are not severed from their employment upon their completion of the program.

Based on the foregoing, and the record as a whole, I find that trainees are employees under Section 2(3) of the Act and are, therefore, included in the petitioned for unit.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to issue subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such a strike and that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Service Employees International Union, Local 617, AFL-CIO, CLC.**

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the voting groups found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **March 31, 2004**. No extension of time to file this list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington,

DC 20570-0001. The Board in Washington must receive this request by **April 7, 2004**.

Signed at Newark, New Jersey this 24th day of March 2004.

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